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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DEONTE DONALD,

Defendant and Appellant.

A121820

(Alameda County
Super. Ct. No. 146000)

I.

INTRODUCTION

Appellant was convicted by jury of multiple offenses, including four counts of first degree murder (Pen. Code, § 187)¹, one count of attempted murder (§§ 187; 664), one count of aggravated kidnapping (§ 209, subd. (b)(1)), two counts of first degree residential robbery (§ 211), and seven counts of second degree robbery (§ 211). Most of the charges contained allegations, found true by the jury, that appellant was armed with, discharged, or used a weapon in the commission of the underlying offenses. Appellant was sentenced to two consecutive prison terms of life without the possibility of parole (LWOP) plus 86 years to life.

On appeal, appellant claims that the court should have excluded his postarrest statements to the police because they were not preceded by a knowing and voluntary waiver of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). He also

¹ All statutory references are to the Penal Code.

makes three assignments of error based on insufficiency of the evidence to support his convictions, and two claims that the trial court failed to properly instruct the jury. Lastly, he raises several sentencing challenges, including a claim that his sentence constitutes cruel and unusual punishment. In all respects, the judgment is affirmed.

II.

FACTS AND PROCEDURAL HISTORY

From November 27, 2002, through January 6, 2003, appellant, who was 17 years old, along with members of a group known as the Nut Cases, engaged in a crime spree in West Oakland and Berkeley.² The group targeted victims, many of them randomly chosen, resulting in several murders, attempted murders, robberies, attempted robberies and other felonies. Appellant was arrested on January 17, 2003. After his arrest, appellant made postarrest statements to the police on January 17, January 20, and January 21, 2003, admitting his involvement in the commission of these crimes, although appellant claimed not to be a member of the Nut Cases. Appellant's tape-recorded statements were introduced into evidence and played for the jury at trial, and transcripts of the statements were distributed.

The criminal episodes shared some common features. During most of these crimes, a woman named Aminah Colbert ("Nay-Nay") was the driver. Although there were sometimes other criminal participants, appellant was almost always accompanied by his cousins Jhomari Sutton ("Corey") and Demarcus Ralls ("Boonie"). Appellant was usually armed with a .357 Smith and Wesson gun. Appellant explained that they were driving around and robbing people chosen at random because they "didn't have no money or nothing."

We briefly summarize the evidence presented on each of the counts resulting in criminal convictions, including appellant's description of the pertinent events contained

² The police never classified the Nut Cases as a gang. Instead, the Nut Cases were viewed as a group of young men who were engaged in random violence.

in his postarrest statements to the police.³ The crimes are presented in chronological order.

November 27, 2002: Counts 8, 9, 10 and 11—Attempted Robbery

On November 27, 2002, at approximately 10:18 p.m., Filimon Betancourt, Salvador Betancourt, Felipe Priego, and Angel Hernandez were socializing outside their apartment building in the 2700 block of West Street in Oakland. They were approached by several men who attempted to rob them, but who were unsuccessful in taking anything from them because of a possible language barrier. During the attempted robbery, one of the men began shooting with a shotgun. Three of the four victims were shot and injured. Victim Angel Hernandez was shot in the face. Victim Felipe Priego lost one of his eyes during the shooting. Victim Filimon Betancourt was shot in the stomach and suffered major trauma to his torso.

In his postarrest statement to the police, appellant acknowledged he was involved in the attempted robbery and shooting of the Mexican men in West Oakland. He said he was with Demarcus, Jhomari, and a man known as “T-Bone.” T-Bone saw the Mexicans and said, “Let’s get them,” meaning rob them. They parked around the corner and got out. T-Bone had a shotgun and was going to tell the men not to move. Appellant and the others were going to go through the men’s pockets.

Appellant and the others approached the men and said, “Give us all [*sic*] everything.” However, the men did not cooperate and tried to fight back. T-Bone fired two to three shots. Appellant ran back to the car. He claimed not to know if anyone was hit by the gunfire. They got no money from this robbery.

³ We omit any description of the crimes alleged in counts 15, 16, 17 and 18, which were dismissed on the prosecutor’s motion after the jury was unable to reach a verdict on these counts. We also omit any description of the crimes alleged in counts 7, 12, 13 and 14 because the jury found appellant not guilty of those offenses.

December 18, 2002: Count 1—First Degree Murder

On December 18, 2002, at approximately 9:00 p.m., a group of people were standing around an intersection in West Oakland. A carload of men drove up and started shooting. Douglas Ware was shot as he was running away. He died on the sidewalk.

In his statement to police, appellant acknowledged that on December 18, 2002, he was riding around with a number of men, including Demarcus, Jhomari, and a man named Leon Wiley (“Twan”). Wiley and his friends referred to themselves as the Nut Cases, but appellant claimed he was not part of this group.

Wiley pulled the car over near a group of about 15 to 20 people and said, “Let’s get ‘em,” which appellant interpreted as meaning “Get out and rob ‘em.” A friend of Wiley’s had handed appellant a gun in the car. Appellant, along with several others, jumped out and started shooting into the crowd “to scare them off.” Appellant did not know if anyone was hit by the gunfire and he did not go back to find out. They did not get any money. Riding away from the scene, appellant felt like he was “in the wrong crowd at the wrong time.”

December 27, 2002: Counts 2 and 3—First Degree Murder; Count 4—Attempted Murder; Count 5—Shooting at an Inhabited Dwelling

On December 27, 2002, at approximately 8:20 p.m., two carloads of men drove up to an occupied apartment on the 800 block of Campbell Street in Oakland. Appellant knocked on the door. When someone answered, numerous men with guns stormed the house, discharging their firearms, including an M-16-type assault rifle. Fourteen-year-old Keith Maki Harris and Jerry Duckworth died of multiple gunshot wounds. Michael Vassar was also shot and wounded.

With regard to this incident, appellant told police that Wiley was having problems with the people living next door to his girlfriend. Appellant, Wiley, and Demarcus, along with several others, went to the house. Wiley was angry. Wiley instructed appellant to knock on the neighbor’s door and then to move aside. When appellant saw a machine gun in Wiley’s hand, he figured he intended to “shoot up in there” when the door opened.

Appellant thought “we shouldn’t do this,” but did not say anything because he was scared. Wiley was “crazy,” and appellant was afraid he would be shot if he refused to knock on the door.

Appellant knocked on the door and said something like, “[w]hat’s the problem going on?” He stepped away when the door was opened. By the time he got to the car, he heard “a whole bunch of shooting going on” He claimed to not know if anyone had been injured or killed in the house.

January 4, 2003: Counts 19 and 20—Second Degree Robbery; Counts 21 and 22—First Degree Robbery

On January 4, 2003, Calvin Lum, Patrick Reynolds, Andrew Young, and Gary Lee were robbed at gunpoint. Victims Young and Lee were located inside the garage of their home at the time of the robbery.

In his postarrest statement to the police, appellant admitted his involvement in this incident involving “Chinese people” who were sitting and talking in their open garage. Appellant, Demarcus, and Jhomari were being driven around by Aminah when Demarcus saw the men. Appellant had a .357 Smith and Wesson gun, and Demarcus also had a gun. Demarcus and Jhomari entered the garage and demanded the men’s wallets while appellant stood watch outside. After they took the wallets, they told the men not to move for several minutes and left, splitting up the money as they drove away.

January 6, 2003 at 8:05 p.m.: Count 23—Aggravated Kidnapping; Count 24—Attempted Second Degree Robbery; Count 25—Criminal Threats

On January 6, 2003, at approximately 8:05 p.m., Christopher Fitzgerald went to his car, which was parked in the 500 block of East 22nd Street in Oakland. He saw three Black men “coming over down the hill.” Fitzgerald was leaning into his car when one of the men he had seen earlier stuck a gun to the left side of his head and told him not to move. When he was asked for money, Fitzgerald removed about \$10 from his pocket. During the robbery, one of the assailants stated “I’m going to do you,” which Fitzgerald took as a threat to kill him. Fitzgerald was asked, “Where’s your house?” When Fitzgerald pointed to an apartment building, the man demanded to be taken there.

Fitzgerald was taken, at gunpoint, 80 to 100 feet from his car to his apartment building. When Fitzgerald was unsuccessful in using the intercom to call his housemate, he stepped back into the shadows ostensibly to yell up to his housemate. However, Fitzgerald took off running and managed to escape.

In his postarrest statement to police, appellant stated that he and his cohorts saw a middle-aged White “guy,” later identified as victim Fitzgerald, sitting in his car. Appellant, Demarcus, and Jhomari ran down toward Fitzgerald and ordered him out of his car. They escorted Fitzgerald away from the car because there was too much light. They walked the man across the street to some apartments and asked him to give them everything. Demarcus pointed a gun at the man. They demanded money, but the man did not have any. Jhomari looked through the man’s car, removed the keys, and threw them in the street.

January 6, 2003 at 9:00 p.m.: Counts 26, 27, and 28—Second Degree Robbery

On the same day at approximately 9:00 p.m., Iraida Gonzalez, Flor Gonzalez, and Edgar Gonzalez were robbed as they were coming out of the Ashby BART station in Berkeley.

Appellant described the robbery at the BART station, noting that the victims were walking up the stairs and had reached the corner when appellant, Jhomari, and Demarcus approached them. At the time, appellant had his gun in his jacket pocket. He claimed he never pointed the gun at anyone. Demarcus was armed as well. Demarcus pointed his gun at the victims and said, “Give us everything.” The victims gave them a camcorder, a purse, and a wallet.

January 6, 2003 at 9:00 p.m.: Count 29—Second Degree Robbery

Around the same time, Stephen Pitcher was leaving the Ashby BART station in Berkeley. He was approached by three men. One of them shoved what Pitcher thought was a gun in his abdomen and said, “Give me your fucking wallet.” Pitcher removed his wallet from his right rear pocket and gave it to the men. The man told Pitcher, “Run and keep running.” Pitcher did so until he reached a place of safety, where he called the police.

In his statement to the police, appellant indicated that he was waiting in the van while Demarcus and Jhomari tried to rob another man that night. Appellant was not sure if they got anything, he just saw the man running away.

January 6, 2003 at 9:25 p.m.: Count 30—Second Degree Robbery

Shortly thereafter, at approximately 9:25 p.m., Christopher Bush was robbed at gunpoint by three men near Grand Avenue in Piedmont. During the robbery, Bush was pistol-whipped in the forehead.

In his postarrest statement to the police, appellant remembered a robbery in Piedmont. Appellant, Demarcus, and Jhomari got out and approached a man, demanding money. When the man started screaming, Demarcus hit him in the forehead with the gun and took the man's wallet. Appellant and the others ran back to the van.

**January 6, 2003 at 10:00 p.m.: Count 31—Attempted Second Degree Robbery;
Count 6—Special Circumstance Murder**

Later that same day, at approximately 10:00 p.m., Cindy Li was robbed at gunpoint while she stood next to her disabled car. She did not have any valuables on her person. Sunny Thach was also nearby at that location. Thach and his wife were carrying their family's laundry to their apartment. A man approached Thach and demanded money. Thach was then shot in the head and killed within view of his wife.

In his statement to the police, appellant acknowledged that he and Jhomari walked up to a "Chinese" woman who appeared to be in her 40's, standing next to her disabled car, with the intention of robbing her. Appellant had a loaded .357-caliber gun. However, the woman did not have anything they could take. Appellant turned and looked up the hill where he saw Demarcus confronting a man, later identified as the murder victim, Sunny Thach. Appellant thought Demarcus was trying to get some money from the man. Demarcus seemed to be struggling with the man, and appellant guessed the man "didn't want to give it up." As appellant ran toward Demarcus, he heard gunshots and a woman screaming. He yelled for Demarcus to "come on" to "get him out of there." As he was running to get into the waiting vehicle, appellant fired his gun twice in the air to make the witnesses go back into their homes. As the van drove away,

Demarcus took money from the victim's wallet and threw the wallet and its contents out the window.

After the prosecution rested, appellant did not present any evidence nor did he testify. After the jury returned its verdicts, the trial court sentenced appellant to two consecutive terms of life without possibility of parole on counts 1 and 6, two concurrent terms of life without possibility of parole on counts 2 and 3, two concurrent terms of life with the possibility of parole on counts 4 and 23, and 25 years to life on the enhancement tied to count 1, plus 86 years.

III.

DISCUSSION

A. The Admissibility of the Postarrest Statements

Appellant claims that his postarrest statements, made to the police on January 17, January 20, and January 21, 2003, which were tape recorded and later presented to the jury, should have been excluded from evidence. After appellant filed a motion to exclude these statements as involuntary and illegally obtained, the trial court heard testimony from the interrogating officers and appellant, and considered a transcript of each interrogation. The court found the prosecution met its burden of establishing a knowing, voluntary, and intelligent waiver.

Appellant raises three circumstances that he contends raise substantial doubt as to whether his purported waiver of his Fifth Amendment rights to silence and to the assistance of counsel was given knowingly and voluntarily. First, he contends that his request to speak with his guardian should have been construed as an invocation of his right to counsel; and once that request was made, all interrogation should have immediately ceased. Second, appellant emphasizes that when he was interrogated, he was a 17-year-old, ninth-grade dropout who could not read or write and that, although he had had prior experience with the criminal justice system, he had never before waived his *Miranda* rights and been interrogated. Third, appellant states that the police used coercive tactics in interrogating appellant, such as confronting appellant with statements

made by another participant implicating appellant in the crimes, threatening him with life in prison, and urging him to tell the truth.

“When a court’s decision to admit a confession is challenged on appeal, ‘we accept the trial court’s determination of disputed facts if supported by substantial evidence, but we independently decide whether the challenged statements were obtained in violation of *Miranda*, *supra*, 384 U.S. 436.’ [Citation.]” (*People v. Lessie* (2010) 47 Cal.4th 1152, 1169 (*Lessie*).)

Here, the court heard testimony from four officers from the Oakland Police Department about the circumstances surrounding the interrogation. They testified that, at each session, appellant was given the *Miranda* advisement before questioning commenced. When appellant was asked if he wished to waive his *Miranda* rights, appellant answered, “yes.” The transcript of each of the interrogations corroborates the officers’ testimony. Appellant also signed a written waiver of his *Miranda* rights. One of the officers described appellant’s demeanor during questioning as “calm, lucid, [and] fairly cooperative.”

The transcripts reveal that throughout the questioning, appellant did not make any request for counsel, ambiguous or unambiguous, and he gave no indication that he wished to remain silent. In one of the transcripts, appellant expressly denies that any promises or threats have been made in exchange for his statements to the interrogating officers. Appellant states, “You all two good people, and I really respect you all.”

Appellant testified at a hearing outside of the jury’s presence solely for the purpose of determining whether he had knowingly and voluntarily waived his right to counsel and to remain silent. Under questioning by his attorney, appellant testified that his birth date was November 23, 1985. He attended “a variety of schools” because his mother was on drugs and kept moving. He described himself as a “slow learner,” and recalled that he was in special education classes until he stopped attending school in the ninth grade. He was able to learn to read and write a “little bit” while in jail.

Appellant testified that he was arrested on January 17, 2003, at his girlfriend’s house. He was naked in bed when the police entered the house. They handcuffed him

and had his girlfriend put clothes on him. After his arrest, he was taken to an interview room. Appellant testified that before the questioning began, he asked the officers if he could call his guardian, Gay Walker, although none of the officers who testified could remember appellant making such a request and there is no writing or recording substantiating that such a request was made.⁴ Appellant indicated he was aware of his right to talk to his guardian because he had been arrested “about three times” as a juvenile; and each time he was arrested, he was taken to the police department, fingerprinted, and allowed to make a phone call.

After he made the request to call his guardian, the officers left the room and returned in about five minutes. They told appellant no one answered the phone. Appellant had not given them his guardian’s telephone number. He did not have any further conversation with the officers about making a telephone call to his guardian.

Appellant acknowledged that he was willing to “participate” and talk to the officers about his crimes even though he had not spoken to his guardian. He admitted signing and initialing a *Miranda* advisement form after his *Miranda* rights were read to him at the beginning of each of the interrogations. However, appellant testified that he did not really understand the nature or consequences of what he was saying when the officers were talking to him. During the first interrogation, appellant was still feeling the effects of Ecstasy, marijuana, and alcohol from the day before and he did not fully understand the questions that the officers were asking. He was in a little room and was not given any food or water from 8:50 a.m. until 4:40 p.m. He did not see any daylight.

After the officers obtained what “they wanted,” he was allowed to make a telephone call. Up until that point, he was not able to make a telephone call.⁵ Appellant

⁴ The officers who interrogated appellant testified that appellant declined a phone call just before the interrogation began. They could not recall appellant asking to call his guardian.

⁵ When appellant was finally allowed to use the telephone after he was interrogated on January 17, 2003, he spoke with his guardian, Gay Walker, and he told her he had been arrested for murder and he was on his way to juvenile hall. He asked her to come and see him.

claimed the officers used the “good cop, bad cop thing” with him. He was threatened with jail time by one of the officers, who told him, “You can go to jail for the rest of your life.” The officers also told him that Jhomari had already given a statement to the police “about certain things that happened.”

On cross-examination, appellant acknowledged he had no problem talking with the officers about “everything that occurred.” The officers did not force appellant to say anything. All of the things he said to the officers was because he wanted to participate. Finally, appellant testified that everything he said in the interviews was the truth.

In ruling on appellant’s motion to exclude his statements to the police, the trial court acknowledged a factual dispute as to whether or not appellant had made a request to call his guardian before the first interrogation. Without specifically resolving this factual dispute, the court ruled that “all of the admonitions were proper under *Miranda*, and the waivers were unequivocal and unambiguous. [¶] As to the voluntariness of the statements, even with the waivers, I find that certainly the defendant’s will was not overborne in any respect when giving the statements that he did. [¶] So my conclusion is that all of the statements—comprising the statements on [January] the 17th, the 20th and the 21st—are admissible and may be utilized during this trial.”

Relying upon *People v. Burton* (1971) 6 Cal.3d 375 (*Burton*), appellant contends his request to contact his guardian should have been construed as an invocation of his Fifth Amendment privilege and, at that point, all interrogation should have ceased. In *Burton*, our Supreme Court held that when a “minor is taken into custody and is subjected to interrogation, without the presence of an attorney, his request to see one of his parents, made at any time prior to or during questioning, must, in the absence of evidence demanding a contrary conclusion, be construed to indicate that the minor suspect desires to invoke his Fifth Amendment privilege. The police must cease custodial interrogation immediately upon exercise of the privilege.” (*Id.* at pp. 383-384.) If the police do not cease, the confession obtained by the subsequent questioning is inadmissible, and, therefore, “the admission of such confession [is] prejudicial per se and compels reversal

of the judgment” (*Id.* at p. 384.) The rule was based upon the belief that a minor seeking help would more naturally request a parent than an attorney. (*Id.* at p. 382.)

However, almost simultaneous with the completion of briefing in this matter, our Supreme Court issued its decision in *Lessie*, *supra*, 47 Cal.4th 1152, disapproving *Burton* on this point. A unanimous Supreme Court in *Lessie* held *Burton* “is no longer good law” in light of the United States Supreme Court’s decision in *Fare v. Michael C.* (1979) 442 U.S. 707 (*Fare*). (*Lessie*, *supra*, at p. 1156.) In *Fare*, the high court reviewed the California Supreme Court’s holding “that a juvenile’s request, made while undergoing custodial interrogation, to see his *probation officer* is *per se* an invocation of the juvenile’s Fifth Amendment rights as pronounced in *Miranda*.” (*Fare*, *supra*, at p. 709, original italics.) The *Fare* court held the California court had erred and instead, “the determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel. [Citation.]” (*Id.* at pp. 724-725.) The court stated that the totality-of-the-circumstances approach to determining voluntariness applied “even where interrogation of juveniles is involved,” reasoning that “[t]he totality approach . . . mandates . . . inquiry into all the circumstances surrounding the interrogation,” such as “the juvenile’s age, experience, education, background, and intelligence” (*Id.* at p. 725.)

In *Lessie*, our Supreme Court adopted the totality-of-the-circumstances test for determining voluntariness, as articulated by the United States Supreme Court opinion in *Fare*, *supra*, 442 U.S. at page 725, even if a minor has made a request to contact a parent before or during a custodial interrogation. (*Lessie*, *supra*, 47 Cal.4th at p. 1168.) In so holding, our Supreme Court expressly disapproved its prior holding in *Burton* to the extent that case held that a juvenile’s request to consult a parent is the equivalent of a request to consult an attorney. (*Ibid.*) Under *Lessie*, a minor’s statements to the interrogating officers would be subject to exclusion only if “the totality of the relevant circumstances demonstrated that his purpose in asking to speak with his [parent] was to

invoke his Fifth Amendment privilege. [Citation.]” (*Lessie, supra*, 47 Cal.4th at p. 1170.)

Here, the totality of the circumstances supports the trial court’s conclusion that appellant knowingly and voluntarily waived his Fifth Amendment rights. Appellant, who was 17 years old and had several prior arrests when the interrogation took place, testified that he understood he had the right to refuse to talk to the police. Moreover, there is nothing to indicate that appellant’s request to speak with his guardian, assuming *arguendo* that such a request was made, constituted an invocation either of his right to remain silent or of his right to counsel. Despite the purported request, appellant continued to make statements to the officers even after he was informed the officers were unable to reach his guardian by telephone.

The same factual scenario was reviewed in *People v. Hector* (2000) 83 Cal.App.4th 228, which involved a 17-year-old defendant who asked to speak with his mother shortly after the interview with the police started. (*Id.* at p. 232.) The court explained, “[w]hen Hector was informed that a detective had been unable to reach his mother, but had left a message for her, Hector did not indicate he wished to stop speaking with the detectives, but instead readily continued to answer their questions.” (*Id.* at p. 237.) The court found that Hector had not invoked his *Miranda* rights by asking to speak to his mother, and we find the same conclusion applies here. (*Ibid.*)

Moreover, the record is devoid of any indication that appellant was of “insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be,” or that he was “worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit.” (*Fare, supra*, 442 U.S. at pp. 726-727; *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 579 [quoting same].) Rather, appellant’s reaction to the questioning was direct, detailed, appropriate and responsive. It is apparent from his statements to the police that he was attempting to minimize his involvement in the crimes, to the extent that it was possible to do so and still be consistent with the evidence. (See *People v. Davis* (1981) 29 Cal.3d 814, 825.) Moreover, we can find nothing in the substance of the police inquiries that was reasonably likely to elicit

information that appellant did not otherwise intend to freely provide. An exhortation by a police officer to “ ‘ ‘ ‘tell the truth’ or that ‘it would be better to tell the truth’ unaccompanied by either a threat or a promise, does not render a subsequent confession involuntary.” ’ [Citation.]” (*People v. Johnson* (2010) 183 Cal.App.4th 253, 294-295.)

In summary, appellant’s repeated, explicit, and on-the-record waivers of his *Miranda* rights, followed by his lengthy and detailed narratives regarding the crimes he committed, and the lack of evidence that he was mistreated or coerced, all indicate that appellant’s will was not overborne. Under the totality of the circumstances, it is clear that appellant fully understood his rights and freely chose to waive them. Consequently, we affirm the trial court’s finding that appellant’s confession was voluntary.

B. Sufficiency of Evidence to Support First Degree Felony Murder of Sunny Thach

Appellant next contends that his conviction for count 6 should be reversed. Appellant contends that the evidence did not support his conviction for felony murder as an aider and abettor of a robbery—the basis presented to the jury for finding him guilty of Sunny Thach’s special circumstance murder. He claims “it was undisputed that [he] did not do any act which assisted or encouraged [Demarcus] Ralls in robbing Thach until after the fatal shooting, when [he] aided and encouraged Ralls’s escape.”

It is undisputed that appellant was not the actual killer of Sunny Thach and that the fatal gunshots were fired by Demarcus Ralls in the course of a robbery. The case was presented to the jury on the theory that appellant was guilty of felony murder in that he aided and abetted a robbery in which the victim was killed. The prosecutor argued that appellant was guilty of felony murder because while he was “running over there” to aid and assist Demarcus in robbing Thach, “the shot rings out” that fatally wounded Thach, whereupon appellant actively assisted and facilitated Demarcus’s escape by firing several shots as they were leaving the crime scene.

In arguing that the evidence was insufficient to support his first degree murder conviction, appellant relies upon *People v. Pulido* (1997) 15 Cal.4th 713 (*Pulido*). In *Pulido*, the California Supreme Court focused on the culpability of a person who aids and

abets a robbery *after* a murder has been committed by a codefendant. First, the court examined the general felony murder rule: “Under long-established rules of criminal complicity, liability for [felony murder] extends to all persons ‘jointly engaged at the time of such killing in the perpetration of or an attempt to perpetrate the crime of robbery’ [citation] ‘when one of them kills while acting in furtherance of the common design.’ [Citation.]” (*Id.* at p. 716.) The court then concluded that a person who begins to aid and abet a robbery after his codefendant has already killed the victim, but before the codefendant has reached a point of temporary safety with the stolen property, would be guilty as an accomplice to the robbery, however, that person would not be liable for murder under the felony-murder doctrine. (*Ibid.*) In the words of the court, “If one person, acting alone, kills in the perpetration of a robbery, and another person thereafter aids and abets the robber in the asportation and securing of the property taken,” the second person is not guilty of felony murder based on the robbery. He or she is an accomplice to robbery, but was “not ‘jointly engaged at the time of such killing’ ” in a robbery, so thus is not guilty of felony murder. (*Ibid.*, italics omitted.)

Relying on *Pulido*, appellant points out that even if he was an aider and abettor to the robbery, he could not be found guilty of felony murder unless there was substantial evidence that he aided and abetted the robbery before Sunny Thach was shot and killed. He claims no such evidence exists and that “no rational trier of fact could have found proof beyond a reasonable doubt that appellant aided and abetted [Demarcus] Ralls in robbing Sunny Thach before the fatal shot was fired.” As we shall discuss in the next section of this opinion, the jury was properly instructed on this theory and rejected it. Furthermore, there is substantial evidence showing that appellant aided and abetted the robbery before Demarcus fired the fatal shot killing Sunny Thach.

Whether a person has aided and abetted in the commission of a crime is a question of fact, and on appeal all conflicts in the evidence and attendant reasonable inferences are resolved in favor of the judgment. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.) Among the factors which may be considered in determining aiding and abetting are

presence at the crime scene, companionship, and conduct before and after the offense. (*Ibid.*)

We believe a reasonable trier of fact could conclude that appellant was running toward Demarcus to assist him in robbing Thach before the fatal shot was fired. This is a fair inference from appellant's own statements to the police. After attempting to rob Cindy Li and discovering she had no money, appellant stated he turned and looked up the hill to his right. Appellant saw Demarcus "about a hundred feet" up the hill, confronting another man. The police interrogator asked, "What do you think he was doing with that guy, or trying to do?" Appellant answered, "Get some money, I guess, sir." Appellant indicated that at this point he started running up the hill, and a reasonable view of the evidence was that appellant was running toward Demarcus and the victim in an effort to help facilitate the robbery. When appellant was "like [50] feet away from them"—which meant that he had already run approximately 50 feet—he heard Demarcus fire the fatal shot.

In a later statement to the police, appellant reiterated, "[W]hen I was on my way running over there, [Demarcus] was tussling with him. By the time I got there, the man was on the ground, shots had already been fired." Appellant then yelled, "Come on," to Demarcus and he fired his gun two times in the air to facilitate their escape from the scene. Consequently, based on appellant's own description of the pertinent events to the police, we find there is substantial evidence that he began aiding and abetting the robbery before the murder took place, subjecting him to liability for first degree murder under the felony-murder rule.

C. Adequacy of Jury Instructions to Support First Degree Felony Murder of Sunny Thach

Appellant next contends that, even if the evidence was sufficient to support his first degree felony-murder conviction in Count 6, reversal is still required due to instructional error. He contends the primary instruction given to the jury regarding liability for felony murder by an aider and abettor, CALCRIM No. 540B, failed to adequately convey that an aider and abettor can be found guilty of felony murder only if

the defendant began aiding and abetting the underlying felony before the victim was killed.

“Challenges to the wording of jury instructions are resolved by determining whether there is a reasonable likelihood that the jury misapplied or misconstrued the instruction. [Citation.]” (*People v. Crew* (2003) 31 Cal.4th 822, 848.) We assume that the jurors are intelligent persons capable of understanding and correlating all the jury instructions they are given. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) We do not consider the challenged wording or instruction in artificial isolation, but view it in the context of the overall charge to the jury. (*People v. Haskett* (1990) 52 Cal.3d 210, 235.)

The court in *Pulido*, *supra*, 15 Cal.4th 713, recognized that when substantial evidence would permit the jury to find the defendant began aiding and abetting an enumerated felony only after the killing occurred, the standard jury instructions on felony murder may require modification. (*Id.* at p. 728.) The court held an instruction would be improper were it to suggest to a jury “that a person who aids and abets only in the asportation phase of robbery, after the killing is complete, is nonetheless guilty of first degree murder under the felony-murder rule.” (*Ibid.*) In such a case, the trial court must give an appropriate instruction to prevent jurors from mistakenly convicting a defendant of felony murder where the evidence is unclear whether he or she joined in the robbery before the victim was fatally wounded. (*Id.* at pp. 728-729.)

Appellant points out that in this case Cindy Li testified that she heard a gunshot while appellant was attempting to rob her and that when appellant “heard the gunshot,” he ran toward the scene of the shooting. Consequently, appellant contends there existed a factual question material to his guilt or innocence since he could not be convicted of felony murder if his participation in the robbery did not begin until after the victim was killed.

We reject the notion that the jury instructions somehow removed this factual issue from the jury’s consideration. CALCRIM No. 540B, as given in this case, generally provided that appellant could be found guilty of first degree felony murder if he

“intended to aid and abet the perpetrator in committing robbery” and a person was killed during the commission of the offense. This instruction also addressed the situation posited by appellant, where one begins aiding and abetting a robbery after the commission of the act causing the victim’s death. The instruction indicated that in order to be found guilty of first degree felony murder, appellant “must have intended to commit robbery or aid and abet the robbery *before or at the time of the act causing death.*” (Italics added.)

Appellant argues that this instruction was inadequate because it did not fully explain to the jury that in order to be convicted for felony murder under an aiding and abetting theory, the appellant had to have not only an intent to aid and abet the robbery before or during the act causing death but he also had to “actually [do] something to aid or encourage the perpetrator.” It is not reasonably likely jurors would have interpreted CALCRIM No. 540B as appellant suggests. This instruction refers to appellant’s liability as an aider and abettor, and then directs the jurors to the instructions on aiding and abetting. These instructions clearly informed the jury that an aider and abettor had to not only “know[] of the perpetrator’s unlawful purpose,” but he or she must also “specifically intend[] to and does, in fact, aid, facilitate, promote, encourage, or instigate the perpetrator’s commission of that crime.” Read in the context of the full charge, the jury would have understood that the felony-murder rule does not apply to one who aids and abets the perpetrator of the robbery only after the killing has been completed.

D. Sufficiency of the Evidence to Support Felony-Murder

Special Circumstance in Murder of Sunny Thach

Because appellant was not Sunny Thach’s killer and did not have the specific intent to kill (§ 190.2, subd. (c)), the felony-murder special circumstance (§ 190.2, subd. (a)(17)) required the prosecution to establish that appellant aided and abetted the robbery as a “major participant” who acted with “reckless indifference to human life.”

(§ 190.2, subd. (d).)⁶ Appellant claims that the special circumstance finding was not supported by sufficient evidence “because no rational juror could have found proof beyond a reasonable doubt that appellant was a major participant in [Demarcus] Rawls’s robbery of Thach.”

“In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

There is no minimum threshold of participation that qualifies a person as a “major participant” in the underlying felony; and the defendant need not necessarily be the ringleader or the triggerman. (*People v. Proby* (1998) 60 Cal.App.4th 922.) “[T]he phrase ‘major participant’ is commonly understood and is not used in a technical sense peculiar to the law. The common meaning of ‘major’ includes ‘notable or conspicuous in effect or scope’ and ‘one of the larger or more important members or units of a kind or group.’ [Citation.]” (*Id.* at pp. 933-934.)

Appellant claims that his conduct did not constitute that of a “major participant” because “[b]y the time appellant reached [Demarcus] Ralls, both the murder and robbery had already been committed.” A similar contention was raised and rejected in *People v. Hodgson* (2003) 111 Cal.App.4th 566 (*Hodgson*). In *Hodgson*, at the time the victim was shot in the head by a coparticipant, killing her instantly, and her property taken,

⁶ Section 190.2, subdivision (d) covers: “every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor. . . .”

defendant was holding open an electric garage gate that was about to close. (*Id.* at p. 570.) Defendant yelled out to the shooter, thus allowing the shooter to barely to squeeze out of the closing gate after committing the shooting and robbery. (*Ibid.*) The defendant argued his involvement in the underlying robbery was not extensive enough to be considered a major participant because he did not supply the gun, he was not armed, and he did not personally take the robbery proceeds. (*Id.* at pp. 578-579.)

Utilizing the deferential substantial evidence standard of review, the *Hodgson* court found a rational trier of fact could have concluded the defendant had active involvement in the robbery and was a “major participant” in the offense, and that he acted with “reckless indifference to human life.” (See § 190.2, subd. (d).) “Because appellant was the only person assisting [the shooter] in the robbery murder his actions were both important as well as conspicuous in scope and effect.” (*Hodgson, supra*, 111 Cal.App.4th at p. 580.) The court also observed that “instead of coming to the victim’s aid after the first shot, [defendant] instead chose to assist [the shooter] in accomplishing the robbery by assuming his position at the garage gate and trying to keep it from closing until [the shooter] could escape from the garage with the loot.” (*Ibid.*, fn. omitted.)

Similarly, the entirety of the record in this case supports the conclusion that appellant was a “major participant” in this robbery. Based on the series of crimes already committed by appellant and his cousins leading up to Sunny Thach’s murder, a pattern of criminal activity was established. Appellant and his coparticipants committed their crimes in numbers, to instill fear in their victims. It was also fairly inferable that each participant would come to one another’s aid and assistance in carrying out their criminal conduct. Prior to the offense in question, robbery victims who had resisted their demands had met with deadly consequences.

Similar to the numerous robberies that appellant and his coparticipants had already committed, a chain of events was set into motion on January 6, 2003, which ultimately resulted in Sunny Thach’s death. Both appellant and Demarcus were armed when they exited the vehicle, and by appellant’s only admission during his postarrest statement, they intended to commit another robbery when they saw Cindy Li standing by her disabled

vehicle. In addition to perpetrating the planned robbery, Demarcus obviously decided to break from the group and rob Sunny Thach too. At the very moment Demarcus shot Sunny Thach, appellant was running toward them after seeing some sort of scuffle. It can fairly be inferred that appellant had consciously decided to render assistance to Demarcus in subduing the robbery victim, knowing that such a confrontation would likely result in the robbery victim's death or serious injury. Immediately after the shooting, appellant left the victim to die, while holding the eyewitnesses at bay by firing several shots so that he and Demarcus could safely escape. These facts justify a finding that appellant was a major participant in the robbery and acted with reckless indifference to human life. We therefore find sufficient evidence to support the jury's special circumstance finding.

E. Sufficiency of the Evidence to Support Aggravated Kidnapping in Count 23

Appellant next argues that there is a lack of substantial evidence to support his conviction for aggravated kidnapping against Christopher Fitzgerald in count 23 because “no rational juror could have found proof beyond a reasonable doubt that the forced movement of Fitzgerald was substantial and not merely incidental to the intended robbery”

Section 209, subdivision (b) outlines a two-prong asportation test to sustain a conviction for aggravated kidnapping. It “requires movement of the victim that is not merely incidental to the commission of the robbery, and which substantially increases the risk of harm over and above that necessarily present in the crime of robbery itself. [Citations.]” (*People v. Rayford* (1994) 9 Cal.4th 1, 12 (*Rayford*).)⁷ In reviewing the sufficiency of the evidence to support appellant's conviction for aggravated kidnapping, we must view the evidence in the light most favorable to the judgment to see if there is

⁷ Section 209, subdivision (b)(1) defines aggravated kidnapping, and provides, “Any person who kidnaps or carries away any individual to commit robbery . . . shall be punished by imprisonment in the state prison for life with the possibility of parole.” Section 209, subdivision (b)(2) adds: “This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense.”

substantial evidence from which any rational trier of fact could find each element of the crime beyond a reasonable doubt. (*People v. Staten* (2000) 24 Cal.4th 434, 460.) We presume “in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. [Citations].” (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.)

So viewed, the facts are as follows: First, in his statement to the police, appellant said that he and his cohorts moved Fitzgerald at gunpoint away from his car because there was too much light. Appellant recalled they told him, “Walk over here up out of the light with us.” Fitzgerald testified that once the robbers were made aware that he lived nearby, he was told, “Take me to your house, you’re my meat, I’m going to do you right now.” He was then forcibly removed from his car at gunpoint by three men, including appellant. While walking with a gun pointed at him, one of the men knocked Fitzgerald’s glasses off his face. Then, after Fitzgerald had been moved between 80 and 100 feet from his car to the front of his apartment building, he stepped into the shadows, purportedly to call up to his roommate to let him in the apartment, and managed to escape.

Our Supreme Court has explained that, in determining whether the movement of a victim was merely incidental to the robbery, the jury should consider the “ ‘scope and nature’ ” of the movement, including the actual distance the victim is moved. (*Rayford, supra*, 9 Cal.4th at p. 12.) However, the court also observed that “there is no minimum number of feet a defendant must move a victim in order to satisfy” the first prong of the asportation test. (*Ibid.*) In considering whether the movement was incidental to the crime, the focus is on the “context of the environment in which the movement occurred. [Citations.]” (*Ibid.*)

The second prong of the asportation test refers to whether the movement subjects the victim to a substantial increase in the risk of harm above and beyond that inherent in the robbery. “This includes consideration of such factors as the decreased likelihood of detection, the danger inherent in a victim’s foreseeable attempts to escape, and the attacker’s enhanced opportunity to commit additional crimes. [Citations.]” (*Rayford*,

supra, 9 Cal.4th at p. 13.) “The fact that these dangers do not in fact materialize does not, of course, mean that the risk of harm was not increased. [Citations.]” (*Id.* at p. 14.)

Appellant acknowledges that many cases uphold aggravated kidnapping convictions where a defendant moves a victim from a public area to a place out of public view, thereby increasing the risk of harm. (See, e.g., *People v. Aguilar* (2004) 120 Cal.App.4th 1044, 1049; *People v. Smith* (1995) 33 Cal.App.4th 1586, 1593-1595; *People v. Salazar* (1995) 33 Cal.App.4th 341, 348.) However, appellant argues that his case is distinguishable because this “movement did not change Fitzgerald’s environment, decrease the risk of detection, or increase the harm. The brief movement down the street was incidental to the intended robbery and cannot support appellant’s conviction of aggravated kidnapping.” We disagree.

Viewing the evidence in a light most favorable to the verdict, we find that a rational jury could conclude that the movement of the victim at gunpoint was not merely incidental to the commission of the robbery, and that the movement aggravated the situation by substantially increasing the risk of harm to the victim. After appellant and his cohorts accosted the victim at his car and took his property, the victim was moved at gunpoint about 80 to 100 feet to a darker, less obvious place, subjecting him to a substantial increase in the risk of harm above and beyond that inherent in the robbery. The intended purpose of the movement was to go inside the victim’s apartment, which would have further isolated the victim and left him more vulnerable to further attack from the perpetrators. This may well have been accomplished if the victim had not employed a ruse in order to escape.

We find this case has many similarities to *People v. Jones* (1999) 75 Cal.App.4th 616 (*Jones*). In *Jones*, the defendant grabbed the victim who was standing in a school parking lot waiting for her boyfriend. (*Id.* at pp. 621-622.) The defendant knocked the victim to the ground, covered her mouth and took various personal items from her. (*Ibid.*) He then walked her to her car, which was approximately 40 feet away, and pushed her inside her vehicle while the alarm was sounding. As the defendant was getting in the vehicle, the victim was able to escape. (*Ibid.*)

On appeal from an aggravated kidnapping conviction, the defendant argued the evidence was insufficient to support the conviction because the movement of the victim was incidental to the robbery and it did not substantially increase the victim's risk of harm. The court disagreed, pointing out that the 40-foot movement across the parking lot was not an "insubstantial distance." (*Jones, supra*, 75 Cal.App.4th at p. 629.) The court also emphasized that the defendant had already taken possession of the victim's wallet and keys when he forced her to walk to her car, so the movement was not incidental to the robbery. (*Id.* at p. 630.) In addition, forcing the victim into a vehicle, removing her from public view, and intending to drive her away, subjected the victim to an increased risk of harm. (*Ibid.*) It was inconsequential that the victim managed to escape, because the fact that the defendant's plan was thwarted "does not mean that the risk of harm was not increased." (*Ibid.*)

In conclusion, because appellant's movement of Fitzgerald was not incidental to the underlying robbery and because it increased the risk of harm, we find the evidence was sufficient to support the aggravated kidnapping conviction in count 23.

F. Duress Instructions

Appellant next contends his convictions for attempted murder (count 4) and shooting at an inhabited dwelling (count 5) should be reversed because the trial court erred in not instructing on the defense of duress.

Duress is available as a defense to defendants who commit a crime "under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused." (§ 26, subd. 6.) "[T]he defense of duress negates the intent or capacity to commit the crime charged. Defendant needs to raise only a reasonable doubt that he acted in the exercise of his free will. [Citation.]" (*People v. Petznick* (2003) 114 Cal.App.4th 663, 676 (*Petznick*).) In order to show that his or her conduct was not the result of the exercise of free will, a defendant claiming duress must show that he or she acted under an immediate threat or menace. (*Ibid.*)

When the instructions were being discussed, defense counsel requested duress instructions to the charge of murder of Duckworth (count 2), the murder of Harris

(count 3) and the attempted murder of Vassar (count 4). Defense counsel argued that such an instruction was warranted based on appellant's statement to the police that he went up to the door of the house and knocked because he was afraid that he might be shot if he refused. The court denied the defense request.

In *People v. Anderson* (2002) 28 Cal.4th 767 (*Anderson*), our Supreme Court declared unequivocally that "Duress is not a defense to murder." (*Id.* at p. 770.) Subsequently, in *People v. Vieira* (2005) 35 Cal.4th 264 (*Vieira*), it held that duress does not negate the requisite intent for one charged with aiding and abetting a murder. (*Id.* at pp. 289-290.) Consequently, there was no error in refusing to instruct on the defense of duress for count 2 (murder of Duckworth) and count 3 (murder of Harris), and appellant does not claim otherwise.

On appeal, appellant now contends that duress instructions should have been given to count 4 (attempted murder of Vassar) and count 5 (shooting at an inhabited dwelling). Respondent acknowledges "that attempted murder, and, it appears, shooting at an inhabited dwelling, are subject to a defense of duress."

A trial court has a sua sponte duty to instruct regarding a defense if there is substantial evidence to support the defense and it is not inconsistent with the defendant's theory of the case. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) We independently review whether substantial evidence existed to support a defense. (*People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1055.)

Appellant claims there was substantial evidence in this case supporting the inference that his participation in the attack on the occupants of the apartment at 871 Campbell in Oakland was the product of duress. In explaining the circumstances which led him to perform his assigned role in a shooting rampage that left two people dead, appellant stated that Wiley instructed him to knock on the door of the house and to then step aside. Appellant thought "we shouldn't do this," but he did not say anything because he was scared. Wiley was "crazy," and appellant was afraid he would be shot if he refused to knock on the door. However, appellant admitted that no one had actually threatened him.

As we have noted, “[a] trial court need only give those requested instructions supported by evidence that is substantial. [Citation.] Central to a defense of duress is the immediacy of the threat or menace on which the defense is premised. [Citations.] ‘[A] phantasmagoria of future harm,’ such as a death threat to be carried out at some undefined time, will not diminish criminal culpability. [Citations.]” (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 125 (*Bacigalupo*)). The duress defense requires a present and active aggressor threatening immediate danger. (*Petznick, supra*, 114 Cal.App.4th at p. 676.)

The court in *Bacigalupo* found defendant’s vague and unsubstantiated assertion in his statement to police that the Columbian Mafia had threatened to kill him and members of his family if he did not commit the charged offense did not constitute substantial evidence warranting a duress instruction. “[I]n the absence of substantial evidence of immediacy of the threatened harm, the trial court did not err in refusing defendant’s proffered instructions.” (*Bacigalupo, supra*, 1 Cal.4th at p. 125.) In *Petznick*, the court found evidence of the defendant’s reluctance to participate in the crimes insufficient to support a duress instruction. (*Petznick, supra*, 114 Cal.App.4th at p. 677.) The court noted, “[t]here was no gun to his head,” and the suggestion that his participation had been coerced by an imminent threat to his life was “pure speculation.” (*Id.* at pp. 677-678.) Also insufficient to establish duress is participation in a crime at the behest of an authority figure who dominated the group and claimed that if anyone “messed up” they would “join” the intended murder victims. (*Vieira, supra*, 35 Cal.4th at pp. 289-290.)

In light of the foregoing cases, we find there was insufficient evidence to support an instruction on the defense of duress. Although appellant claimed he participated in the shooting rampage at 871 Campbell out of fear for his life, rather than a desire to help Wiley exact retribution for some perceived grievance, he does not cite any evidence that he was actually threatened with imminent death if he did not carry out the plan. In fact, appellant admitted in his statement to the police that no one had actually threatened him. In *People v. Keating* (1981) 118 Cal.App.3d 172, 179, the court similarly rejected a claim that the trial court had erred in failing to instruct on duress when the defendant did not

say that his companion had actually threatened him. Appellant never parted company with the other participants in the crime despite ample opportunities to do so; and he continued to take an active and deadly role in committing additional crimes after the shooting at 871 Campbell. In short, appellant's conduct and his statements to the police do not show substantial evidence of a " 'present and active aggressor threatening immediate danger[.]' . . ." (*Vieira, supra*, 35 Cal.4th at p. 289.) Without such evidence, the trial court had no duty to instruct the jury on the defense of duress.

G. Right to Jury in Imposing Sentence of Life Without Possibility of Parole

Appellant next contends his sentence of life without possibility of parole violates the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) because, in imposing this sentence, the trial court relied on aggravating sentencing factors that were found true by the court and not by the jury. This claim is meritless.

In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra*, 530 U.S. at p. 490.) "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Blakely, supra*, 542 U.S. at pp. 303-304, original italics.)

Invoking the principles of *Apprendi* and *Blakeley*, appellant argues that the life without possibility of parole sentence he received in this case could not constitutionally be imposed "without a jury determination that the mitigating factors are outweighed by aggravating factors." Appellant's argument focuses on section 190.5, subdivision (b).

Section 190.5, subdivision (b), provides: “The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.”

Section 190.5, subdivision (b) has been interpreted to express a presumptive sentence of life without possibility of parole for youthful offenders convicted of first-degree special-circumstance murder. (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1145 (*Guinn*)). “[S]ection 190.5 means . . . that 16-or 17-year-olds who commit special circumstance murder *must* be sentenced to LWOP [life without possibility of parole], *unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life.” (*Id.* at p. 1141.)

The court in the present case considered appellant’s arguments for leniency and rejected them. This does not mean that the court, instead of the jury, made findings that increased appellant’s sentence beyond the statutory maximum which would implicate *Apprendi* and *Blakely*. Section 190.5 establishes life without parole as the presumptive punishment for special circumstance murder committed by those in appellant’s age group. Section 190.5 “does not involve two equal penalty choices, neither of which is preferred. The enactment by the People evidences a preference for the [life without parole] penalty. In addition, the statutory language expressly provides that any exercise of discretion to impose the more lenient penalty is to be performed *by the court*, and not by a jury.” (*Guinn, supra*, 28 Cal.App.4th at p. 1145; accord, *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089.) Consequently, the court’s decision not to reduce appellant’s sentence to 25 years to life did not implicate his Sixth Amendment rights discussed in *Apprendi* and *Blakely*.

H. Cruel and Unusual Punishment

Lastly, appellant claims that his “sentence of [86] years to life plus life without possibility of parole violates the state and federal constitutional prohibitions on cruel and unusual punishment and should be reversed.”

“Cruel and unusual punishment is prohibited by the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution. Punishment is cruel and unusual if it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity. [Citation.]” (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358, fns. omitted.)

In arguing that his sentence constitutes cruel and unusual punishment, appellant relies on *Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*), which holds that the death penalty is excessive punishment when imposed on a person who was under 18 when the underlying crime was committed.

Here, however, we are not concerned with the death penalty. “Proportionality review is one of several respects in which [the Supreme Court has] held that ‘death is different,’ and ha[s] imposed protections that the Constitution nowhere else provides. [Citations.]” (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [lead opn. of Scalia, J.]; see also *Ring v. Arizona* (2002) 536 U.S. 584, 606 [“ ‘[d]eath is different’ ”].)

Appellant does not cite any United States Supreme Court or California authority holding that a sentence of life without possibility of parole is constitutionally excessive where, as here, a 17-year-old participates in a senseless and violent crime spree resulting in four murders and numerous attempted murders and robberies. Recently the United States Supreme Court decided in *Graham v. Florida* (2010) ___U.S. ___, 130 S.Ct. 2011 (*Graham*), that a life without parole sentence is unconstitutionally disproportionate for any non-homicide crime committed by a person under the age of 18. Unlike the petitioner in *Graham*, however, appellant was convicted of four first degree murders, and we see nothing in *Graham* that undermines California authority rejecting appellant’s

argument that a life without possibility of parole sentence in a case such as his offends the proscription against cruel and unusual punishment.⁸

In *People v. Demirdjian* (2006) 144 Cal.App.4th 10, the court held that it was not cruel and unusual punishment to impose two consecutive terms of 25 years to life with the possibility of parole on a person who was 15 years old when he committed the crimes—two first degree murders with special circumstances. (*Id.* at pp. 12-13.) *Demirdjian* cited *Guinn, supra*, 28 Cal.App.4th 1130, which had earlier come to virtually the same conclusion, in a case where a 17-year-old defendant had been sentenced to life without possibility of parole after being convicted of a special-circumstance murder. (*People v. Demirdjian, supra*, 144 Cal.App.4th at p. 16.) In *Guinn*, the court stated: “While we agree that the punishment is very severe, the People of the State of California in enacting [section 190.5] have made a legislative choice that some 16 and 17-year-olds, who are tried as adults, and who commit the adult crime of special circumstance murder, are presumptively to be punished with LWOP. We are unwilling to hold that such a legislative choice is necessarily too extreme, given the social reality of the many horrendous crimes, committed by increasingly vicious youthful offenders, which undoubtedly spurred the enactment.”⁹ (*Guinn, supra*, 28 Cal.App.4th at p. 1147; see also *People v. Gonzales* (2001) 87 Cal.App.4th 1, 16-19 [sentencing a 14-year-old to 50 years

⁸ At oral argument, appellant’s counsel suggested that we should extend *Graham*’s reasoning to encompass those juveniles who aid and abet homicides because they are less culpable than the actual perpetrators. The *Graham* court had no occasion to consider this argument because the juvenile in that case had not been convicted of a homicide. Therefore, we believe *Graham* is of no assistance to appellant in advancing this argument because a case cannot be considered authority for a proposition it does not consider. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.)

⁹ We note that California is not alone in authorizing life without possibility of parole as the appropriate sentence for the state’s most serious youthful offenders. A recent statistical compilation reports that statutes in 42 states permit juveniles to be sentenced to life without possibility of parole, while five states and the District of Columbia legislatively prohibit it. (Fine, *Death Behind Bars: Examining Juvenile Life Without Possibility of Parole in Sullivan v. Florida and Graham v. Florida* (2009) 5 Duke J. Const. L. & Pub. Policy Sidebar 24, 32-33.)

to life was not cruel and unusual punishment]; *People v. Em* (2009) 171 Cal.App.4th 964, 971-977 [indeterminate life sentence of 50 years to life constitutional for a 15-year-old who was convicted as a nonshooting accomplice to murder]; *Harris v. Wright* (9th Cir.1996) 93 F.3d 581, 583-584 [sentencing a 15-year-old to life without parole was not cruel and unusual punishment].)

Appellant next claims “[i]nternational law condemns LWOP for juveniles.” Appellant then cites Articles 10 and 24 of the United Nations’ International Covenant on Civil and Political Rights (ICCPR), an international treaty ratified by the United States in 1992. However, as appellant acknowledges, in ratifying the treaty, the United States reserved the right, in exceptional circumstances, to treat juveniles as adults.

Appellant also raises his lack of mental acuity to support his constitutional attack on his sentence. He cites his own testimony from the suppression hearing indicating he was a “slow learner” who “had dropped out of school in the ninth grade, having been passed each year in special education classes despite his inability to read or write.” The United States Supreme Court has held that capital punishment may not be imposed on mentally retarded adults. (*Atkins v. Virginia* (2002) 536 U.S. 304, 321.) In reaching this conclusion, the court focused on the uniqueness of the death penalty and, in particular, on the number of states that had enacted legislation prohibiting execution of the mentally impaired; it did not suggest any lesser sanction, such as a lengthy term of imprisonment, would be prohibited. (*Id.* at pp. 318-321.) Moreover, our Supreme Court has made clear that in order for mental impairment to raise a question of excessive punishment, the defendant must exhibit “significantly subaverage intellectual functioning and deficiencies in adaptive behavior” in a number of skill areas, including “communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety” (*In re Hawthorne* (2005) 35 Cal.4th 40, 48.) Appellant did not present any evidence establishing any such deficiencies. Therefore, we do not view appellant’s self-serving testimony about his limited intellectual functioning as mitigating the seriousness of the callous crimes he committed. (See *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511 [law holds

individual with unfortunate upbringing and learning disabilities responsible for his or her criminal behavior].)

For the foregoing reasons, we find the sentence of life without possibility of parole plus 86 years to life did not violate the state or federal constitutional prohibitions against cruel and unusual punishment.

**IV.
DISPOSITION**

The judgment is affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.